

AN ETHICS GUIDE FOR CONSULTANTS AND ADVISORY COMMITTEE MEMBERS AT THE DEPARTMENT OF DEFENSE

At the Department of Defense (DoD), we are fortunate to have many experts and industry leaders from outside of the Government to provide advice to the Secretary as consultants or members of an advisory committee. Because many of you retain extensive links to Defense industries or other organizations related to national security, it is important that you understand potential conflicts of interest that may arise from your appointment to this Department. Recognizing your demanding schedules, this guidance only briefly summarizes those statutes and regulations most likely to affect you, and does not describe each element or exception.

1. Getting Advice

If you believe your situation may be affected by any of the guidance below, please contact the Standards of Conduct Office (SOCO) of the Office of the DoD General Counsel at (703) 695-3422, fax us at (703) 614-4432, or email us at SOCO@dodgc.osd.mil. We also have considerable guidance, including financial disclosure reporting, on our website at: http://www.defenselink.mil/dodgc/defense_ethics.

SOCO is available to provide advice on any ethics question you may have, many of which may be answered in a telephone call or by email. Good faith reliance on the ethics advice from an ethics official will, in most cases, protect you from adverse administrative action and deter criminal prosecution.

2. What Does It Mean to be a Special Government Employee?

In the Department, almost all consultants and all members of advisory committees are appointed as Special Government Employees (SGEs). This means that upon appointment, you assume the responsibilities, obligations, and restrictions that are part of public service. Because SGEs are not full-time employees, several of these restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, but it is always temporary. In fact, you should not serve for more than 130 days during any period of 365 consecutive days. This 130-day period is an aggregate of all your Federal service, not just your appointment at the Department of Defense. For example, it includes days you have served as an SGE in other Federal agencies or departments, and even days as a military reservist. If you have served in other Federal agencies or departments within the last year, please advise the appropriate committee manager, executive director, or Designated Federal Official (DFO), so that you do not exceed the 130-day period of appointment.

When computing days that you work as an SGE, count each day in which you perform services, even if it does not amount to an entire workday. Brief non-substantive interactions, such as emails or phone calls to set up a meeting, do not have to be counted as a day of duty.

3. Financial Disclosure

You are required to file either a public or confidential financial disclosure report (SF 278, OGE Form 450, or DoD Alternate Reporting Form) when you are first appointed, and annually thereafter if you are reappointed. As a member of an advisory committee, you may also be required to update the report before each meeting throughout your term of appointment. The purpose of financial disclosure is to protect you from inadvertently violating any of the criminal conflict of interest statutes, discussed below, and to ensure the public and this Department that your advice is free from any real or perceived conflict of interest. The supervisor or DFO, and a DoD ethics official review the reported information, which is not releasable to the public if it is a confidential financial disclosure report, except as authorized by the Privacy Act.

4. Criminal Conflict of Interest Statutes

You are required to comply with various criminal statutes while you are an SGE. These statutes are codified at 18 U.S.C. 201, 203, 205, 207, and 208, and are divided into the following subject areas: (1) financial conflicts of interest; (2) representational activities; and (3) limits on representation after you leave the Government.

Financial Conflicts of Interest

The main financial conflict of interest statute, **18 U.S.C. 208(a)**, prohibits you from participating personally and substantially in any particular matter that affects your financial interests, as well as the financial interests of your spouse, minor child, general partner, an organization in which you serve as an officer, director, trustee, general partner, or employee, or an organization with which you are negotiating or with which you have an arrangement for prospective employment. The primary reason you are required to disclose your financial interests is to alert the supervisor or DFO, and agency ethics official of any potential conflict of interest prior to your participation in a particular matter involving an entity in which you have a financial interest.

A financial interest might arise in various ways. For example, you could have a financial interest that could conflict with your participation in an advisory committee meeting that reviews whether a certain weapons program should be continued if:

- you own stock in the prime or subcontractor that supplies the weapon;
- your spouse owns stock in, or works for, the contractor(s);
- you are a consultant to, or employee of, the contractor(s);
- you are a member of the board of directors of the contractor(s), or
- you have a contract with the contractor(s) to provide supplies, parts, or services.

This statute does not apply to you unless you participate in a particular matter. Generally, DoD advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for conflicts of interest. A particular matter is a matter that involves deliberation, decision or action that is focused upon the interests of specific persons, or a discrete and identifiable class of persons. A deliberation that focuses on a discrete and identifiable class of persons as part of a broader policy deliberation, however, would not be a particular matter. For example, if an advisory committee deliberates on the topic of unmanned aerial vehicles (UAVs), which have a limited number of companies that manufacture them, then committee deliberations would be a particular matter. If, on the other hand, the topic is the future of aerial vehicles in general, then committee deliberations of UAVs as part of a broader policy deliberation would not be a particular matter. In the former example, any committee members who have a financial interest in a company that manufactures UAVs would have a conflict of interest if they participated in the advisory committee discussion.

If you become aware of such a financial conflict of interest, you must disqualify yourself from acting in a governmental capacity in the matter and notify the DFO, committee manager, or supervisor. You should also consult your ethics official, since there are several regulatory exemptions that may permit you to participate even when you have certain financial interests that cause a conflict of interest. For example, employees are permitted to participate in particular matters affecting companies that they own as part of a diversified mutual trust. Employees may also act in particular matters affecting companies in which the aggregate value of the employee's holdings does not exceed \$15,000. Since there are other exemptions, you should contact your ethics official.

The statute and implementing Federal regulations provide for waivers that may also allow you to work on matters in which you have a financial conflict of interest. Such waivers must be obtained before you participate in the matter. Since waivers are complex, you should seek advice from your DoD ethics official.

You should also keep in mind that, even though the deliberations may not involve a particular matter under the criminal statute, having an interest in or being affiliated with any company that is the focus of a deliberation would require your recusal from discussions. A combination of DoD policy, and appearance and misuse of position concerns under the Standards of Conduct regulations, would prohibit your participation.

Another Federal statute, **18 U.S.C. 201**, commonly known as the bribery statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.

Representational Activities

Two statutes, 18 U.S.C. 203 and 205, prohibit Federal employees, including SGEs, from acting as an agent or attorney for private entities before any agency or court of the Executive or Judicial Branches. For SGEs, section 203 prohibits the receipt of

compensation for representational services only in any particular matter involving a specific party: (1) in which the SGE has participated personally and substantially as a Government employee; or (2) which is pending in this Department and the SGE served for more than 60 days during the immediately preceding 365 days. Representational services include written or oral communications and appearances made on behalf of someone else with the intent to influence or persuade the Government. An inquiry into the status of a pending matter, such as an application for Federal funding, a progress report regarding a Cooperative Research and Development Agreement or clinical trial, or a pending investigation, is not necessarily a representation, but could give rise to an appearance of a prohibited representation. Section 205 parallels section 203, except that even uncompensated representations by employees are prohibited.

Limits on Representations After You Leave the Government

The final statute, 18 U.S.C. 207, prohibits former employees, including SGEs, from representing another person or entity to this Department or to another Federal agency or court in any particular matter involving a specific party in which the former SGE participated personally and substantially while with the Government. This bar lasts for the lifetime of the particular matter.

Additionally, if you were paid for your services as an SGE, and your basic rate of pay was \$145,320/year or over (in 2007), and you served 60 days or more as an SGE during the 1-year period before terminating service, you are also subject to the same 1-year cooling-off period that is applicable to former senior officials. For 1 year after terminating your appointment, you would be prohibited from making a communication or appearance on behalf of any other person, with the intent to influence, before any employee of the agency in which you served, in connection with any matter on which such a person seeks official action. Please note that this bar is not limited to particular matters, but includes policy matters as well, and that it does not apply to the entire Department of Defense, but only to the component in which you were appointed.

SGEs who qualify for the above restriction are also prohibited, for 1 year after their appointment terminates, from representing a foreign entity before any Federal agency, or aiding or advising a foreign entity, with the intent to influence a decision by that agency.

5. Standards of Ethical Conduct

The following paragraphs highlight some of the administrative Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that pertain to DoD SGEs.

Teaching, Speaking, and Writing in a Personal Capacity

Generally, during your term of appointment, you may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in your personal or non-Government capacity, but there are several limitations.

You are prohibited from receiving compensation for teaching, speaking, or writing (“activity”) that “relates to the employee’s official duties.” 5 C.F.R. 2635.807. For you, the “relatedness” test is met if:

- the activity is undertaken as an official Governmental duty;
- the invitation was extended to you primarily because of your position in the Government rather than your expertise on the particular subject matter; the invitation was extended to you, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of your official duties;
- the information conveyed through the activity draws substantially on ideas or official data that are confidential or not publicly available; or
- during a 1-year period of your current appointment,
 - 1) if you serve for more than 60 days and the subject of the activity deals in significant part with any matter to which you are presently assigned or were assigned during the previous 1-year period, or
 - 2) if you serve 60 days or less and the subject deals in significant part with a particular matter involving specific parties in which you participated or are participating personally and substantially.

Notwithstanding the above limitations, you may receive compensation for teaching, speaking, or writing on a subject within your discipline or inherent area of expertise based on your educational background or experience. In addition, these restrictions do not apply to teaching a course requiring multiple presentations that is part of the regularly established curriculum of an institution of higher education, an elementary or secondary school, or a program of education or training sponsored and funded by the Federal, state, or local governments.

If you use or permit the use of your military rank or your DoD title or position as one of several biographical details given to identify yourself in connection with your personal teaching, speaking, or writing, whether or not compensated, and if the subject of the teaching, speaking, or writing deals in significant part with any ongoing or announced policy, program, or operation of the Department of Defense, you should make a disclaimer that the views presented are your views and do not necessarily represent the views of this Department or its components.

Acceptance of Gifts from Outside Sources

Any gift given to you from a DoD prohibited source or because of your service on the advisory committee or as a consultant to this Department will raise concerns and may be prohibited. 5 C.F.R. 2635.202. You may accept gifts given to you because of your personal, outside business, or employment relationships. There are other exceptions, but since they are often fact-specific, you should consult your agency ethics official.

Providing Expert Testimony

If you participated while a Federal employee in a particular United States judicial or administrative proceeding or in a particular matter that is the subject of the proceeding, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in that proceeding if the United States is a party or has a direct and substantial interest. 5 C.F.R. 2635.805. However, such testimony may be authorized by the DoD General Counsel.

In addition, if you are appointed by the President, serve on a commission established by statute, or have served or are expected to serve for more than 60 days in a period of 365 consecutive days, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a United States court or agency in which the Department of Defense is a party or has a direct and substantial interest, unless authorized by the DoD General Counsel.

Impartiality

Although you are prohibited by 18 U.S.C. 208(a) from participating in matters in which you have a financial interest, there may be other circumstances in which your participation in a particular matter involving specific parties would raise a question regarding your impartiality in the matter. For example, you may be asked to review a grant application submitted by your mentor or someone with whom you have a close personal or professional relationship. Or your advisory committee may consider a weapons program operated by your former employer or former client. This may raise a concern about your impartiality in the review.

While the impartiality rule is quite complex and very broad in scope, there are several triggers that are helpful. 5 C.F.R. 2635.502.

1. Your official duties must involve a particular matter involving specific parties [As discussed above, DoD advisory committees usually focus on policy-level issues and do not consider particular matters involving specific parties],
2. The circumstances would cause a reasonable person with knowledge of the relevant facts to question your impartiality, and
3.
 - a) The matter is likely to have a direct and predictable effect on the financial interests of a member of your household, or
 - b) someone with whom you have a relationship (such as a relative, a business or financial entity, a former employer, an employer or client of your spouse, or an organization in which you are an active participant) is, or represents, a party to the matter.

Considering the breadth of this prohibition and how much it depends upon the perception of the beholder, if you believe your participation in advisory committee discussions could subject you to criticism, please contact your supervisor, DFO, or agency ethics official to determine whether you should be disqualified from participation in the matter, or authorized to participate in the matter.

Serving Two Masters

As indicated in the above regulation on impartiality, you cannot represent two entities and retain impartiality. For example, you may be an employee of a corporation or nonprofit organization which intends to submit its views to Government officials regarding the same subject matter that the advisory committee is studying. In such a situation, you must recuse yourself from participation in either the corporation or nonprofit organization's recommendation, or, recuse yourself from participation in the advisory committee's recommendation. If you find yourself in this situation, consult your DFO or ethics counselor.

Endorsement of Non-Federal Entities

Many DoD SGEs hold senior and influential positions in their private lives. However, please remember that you may not use, or permit the use of, your official title, position, organization name, or authority associated with your Government position to imply a DoD or Government endorsement of a non-Federal entity, event, product, service, or enterprise. 5 C.F.R. 2635.702. Provided that you act exclusively outside the scope of your official position and abide by the restrictions discussed above, you may participate and support the activities of non-Federal entities in your personal capacity.

Misuse of Position

Primarily because of the stature and visibility of many of our consultants and members of advisory committees, actions that may be perceived as the misuse of their public office tend to receive uncommon public scrutiny. The prohibition, which applies to all Federal employees, bars the use of public office for private gain. 5 C.F.R. 2635.702. This broad prohibition generally is triggered by the following:

1. Using your title, position, or authority for your own private gain, or the private gain of friends, relatives, clients, or anyone with whom you are affiliated in a non-Governmental capacity (including nonprofit organizations in which you serve as an officer, member, employee, or persons with whom you have or seek an employment or business relationship);
2. Using your title, position, or authority to coerce or induce another person to provide any benefit to yourself or any person identified above;

3. Using non-public information in a financial transaction to further your private interests or those of another, or disclosing confidential or non-public information without authorization; or
4. Using Government property and time for unauthorized purposes.

A good example is when a private entity issues a press release announcing that one of its employees will serve on a DoD Advisory Committee. To many, selection to serve on a DoD Advisory Committee confirms the SGE's expertise and wisdom, and therefore tends to lend similar credence to the private entity. It also suggests Department of Defense endorsement of the private organization. Thus we discourage private companies from issuing such press releases.

Fundraising

There are several rules that cover fundraising activity, both in an official capacity and in a personal capacity, that are applicable to DoD employees, including SGEs. Although it is not likely that you will be asked to participate officially in the solicitation of funds or the endorsement of a fundraising effort, you should seek the guidance of this Office prior to such participation.

Generally, you may fundraise in your personal capacity. However, you may not fundraise in the Federal workplace (except for collecting gifts-in-kind, such as food, clothing and toys), and you may not solicit funds from any person that you know is a prohibited source whose interests may be substantially affected by performance or non-performance of your official duties. Finally, please do not use or permit use of your official title, position, or authority associated with your position to further the fundraising effort.

Lobbying Activities

While the time you spend performing official duties as an SGE is usually brief, please remember that during those periods, you are prohibited from engaging in any activity that directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. (18 U.S.C. 1913) This statute does not bar you, in your official capacity, from appearing before any individual or group for the purpose of informing or educating the public about a particular policy or legislative proposal, or from communicating to members of Congress at their request. Communications to members of Congress initiated by you, in your official capacity as a member of an advisory committee or as a consultant, must be coordinated through the Office of Legislative Affairs.

As a private citizen, you may express your personal views (but not the views of the advisory committee as a whole or the opinions of this Department) to anyone. In doing so, you may state your affiliations with the advisory committee, may factually state the committee's official position on the matter (to the extent that non-public information

is not used), but may not represent your positions or views as the committee's or the Department's position on the matter. Moreover, in expressing your private views, as with all other personal (non-Government) activities, you are not permitted to use Government computers, copiers, telephones, letterhead, staff resources, or other appropriated funds.

Foreign Agents

You may not act as an agent or lobbyist of a foreign principal required to register under the Foreign Agents Registration Act or the Lobbying Disclosure Act of 1995 unless the head of the agency certifies that your employment is in the national interest. 18 U.S.C. § 219. If you have registered under either of these statutes, please contact SOCO.

Hatch Act

The Hatch Act, which limits the political activities of Federal civilian employees, applies to you only while you are conducting Government business. 5 U.S.C. §§ 7321-7326.

Disclosure of Information

You may not disclose classified or proprietary information that you receive in the course of your official duties. Before disclosing information that is proprietary, not releasable under the Freedom of Information Act, protected by the Privacy Act, or otherwise restricted, please confirm that it may be released. 18 U.S.C. § 1905.

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